

0106B

BEFORE THE SHORELINES HEARINGS BOARD  
STATE OF WASHINGTON

HENRY N. ROEBEN,

Appellant,

v.

FERRY COUNTY and STATE OF  
WASHINGTON, DEPARTMENT OF  
ECOLOGY,

Respondent.

SHB No. 90-23

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

This matter came on for hearing before the Shorelines Hearings Board, William A. Harrison, Administrative Appeals Judge, presiding, and Board Members Judith A. Bendor, Chair, Harold S. Zimmerman, Annette S. McGee and Jon Wagner.

The matter is a request for review of a denial of a setback variance.

Appearances were as follows:

1. Michael C. Beegle, Attorney at Law, for appellant Roeben.
2. Allen C. Nielson, Ferry County Prosecuting Attorney.
3. Kerry O'Hara, Assistant Attorney General, for Department of Ecology.

The hearing was conducted in Spokane, Washington, On October 12, 1990.

Jennifer Boyd of Storey & Miller Court Reporting Services provided court reporting services.

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1  
2 Witnesses were sworn and testified. Exhibits were examined.  
3 From testimony heard and exhibits examined, the Shorelines Hearings  
4 Board makes these

5 FINDINGS OF FACT

6 I

7 This matter arises on the Kettle River in Ferry County in the  
8 Town of Curlew.

9 II

10 Appellant Henry N. Roeben, purchased a saloon in Curlew in  
11 February, 1989. The saloon fronts on River Street with the River  
12 flowing by at the rear of the property.

13 III

14 When Mr. Roeben purchased the saloon it had been in existence for  
15 quite some time. A garage was also in existence, to one side, and a  
16 mobile home was behind the saloon.

17 IV

18 Upon purchasing the property, Mr. Roeben decided to remove the  
19 existing mobile home and replace it with a new and larger mobile  
20 home. To that end he sought and obtained a mobile home permit from  
21 Ferry County. That permit was granted under date of February 13,  
22 1989, the month in which the saloon property was purchased.

23  
24  
25  
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V

The mobile home permit granted by Ferry County contains the following on its face:

*Ferry County Shorelines Management Plan*

*17.30.02 "Buildings shall not be constructed closer than fifty (50) feet from the ordinary high-water mark"*

Though in small print, the above language is legible as it appears on the mobile home permit.

VI

Mr. Roeben has held a Washington State real estate license, off and on, over the past 18 years.

VII

After obtaining the mobile home permit, Mr. Roeben arranged for the removal of the existing mobile home. By sometime in May, 1989, he marked the location for the new, 72-foot, four-bedroom mobile home on the ground. That done, Mr. Roeben notified the County.

VIII

In response to Mr. Roeben's notification that the location was marked, the Ferry County Building Inspector, Mr. Buck Wilhite, visited the site in May, 1989. Mr. Roeben was away at the time. The location was pointed out to Mr. Wilhite by the bartender. The exact conversation between the bartender and Mr. Wilhite is not shown on this record. However, Mr. Wilhite acquiesced to the proposed location.

IX

Had he measured, Mr. Wilhite would have found that the location proposed by Mr. Roeben encroached into the 50 foot shoreline setback. The footings lay approximately 30 feet, rather than 50 feet, from the River.

X

Later in May, 1989, Mr. Wilhite returned to the property. By this time, however, Mr. Roeben had secured the mobile home to its footings in reliance upon his understanding of Mr. Wilhite's first visit.

XI

On June 1, 1989, Mr. Wilhite wrote to Mr. Roeben declaring the mobile home to be in violation of the 50 foot setback requirement of the Ferry County Shoreline Master Program, Section 17.30.02.

XII

Mr. Roeben next applied to Ferry County for a variance, from the 50 foot setback requirement. This was denied by Ferry County by a document dated March 19, 1990. From this, Mr. Roeben appeals.

XIII

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such. From these Findings of Fact, the Board makes these

CONCLUSIONS OF LAW

I

The Kettle River is designated by state and local authority as a

1  
2 "shoreline of statewide significance." RCW 90.58.030(2)(e)(v)(B) of  
3 the State Shoreline Management Act and Ferry County Shoreline Master  
4 Program (FCSMP) Section 8(4), p. 11.

5 II

6 The site in question is designated as a "Rural" environment by  
7 the FCSMP. Within this environment, buildings must be set back 50  
8 feet from the ordinary high water mark of the River. FCSMP Section  
9 17.30.02, P. 21.

10 III

11 The statewide criteria for variance from shoreline requirements  
12 follows below. The variance requirement of the FCSMP, though stated  
13 differently, is not more stringent.

14 The statewide standard, at WAC 173-14-150 therefore applies. It  
15 states:

16 WAC 173-14-150 Review criteria for variance  
17 permits. The purpose of a variance permit is strictly  
18 limited to granting relief from specific bulk,  
19 dimensional or performance standards set forth in the  
20 applicable master program where there are extraordinary  
or unique circumstances relating to the property such  
that the strict implementation of the master program  
will impose unnecessary hardships on the applicant or  
thwart the policies set forth in RCW 90.58.020.

21 Construction under this permit will not begin or is  
22 not authorized in a thwarting of the policy enumerated  
in RCW 90.58.020. In all instances extraordinary  
circumstances shall be shown and the public interest  
shall suffer no substantial detrimental effect.

23 (2) Variance permits for development that will be  
24 located landward of the ordinary high water mark  
(OHWM), as defined in RCW 90.58.030(2)(b), except  
25 within those areas designated by the department as  
marshes, bogs, or swamps pursuant to chapter 173-22  
WAC, may be authorized provided the applicant can

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1 demonstrate all of the following:

2 (a) That the strict application of the bulk,  
3 dimensional or performance standards set forth in the  
4 applicable master program precludes or significantly  
5 interferes with a reasonable use of the property not  
6 otherwise prohibited by the master program:

7 (b) That the hardship described in WAC  
8 173-14-150(2)(a) above is specifically related to the  
9 property, and is the result of unique conditions such  
10 as irregular lot shape, size, or natural features and  
11 the application of the master program, and not, for  
12 example, from deed restrictions or the applicant's own  
13 actions;

14 (c) That the design of the project is compatible  
15 with other permitted activities in the area and will  
16 not cause adverse effects to adjacent properties or the  
17 shoreline environment.

18 (d) That the requested variance does not constitute  
19 a grant of special privilege not enjoyed by the other  
20 properties in the area, and is the minimum necessary to  
21 afford relief; and

22 (e) That the public interest will suffer no  
23 substantial detrimental effect.

24 (4) In the granting of all variance permits,  
25 consideration shall be given to the cumulative impact  
26 of additional requests for like actions in the area.  
27 For example if variances were granted to other  
developments in the area where similar circumstances  
exist the total of the variances shall also remain  
consistent with the policies of RCW 90.58.020 and shall  
not produce substantial adverse effects to the  
shoreline environment. . . .

#### 28 IV

29 A variance applicant must demonstrate all of the circumstances  
30 listed in 2(a) through (e) and (4) of the above rule, WAC 173-14-150.

#### 31 V

32 Appellant has not shown that the master program "precludes or  
33 significantly interferes with a reasonable use of the property" under

34 FINAL FINDINGS OF FACT  
35 CONCLUSIONS OF LAW AND ORDER  
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1  
2 WAC 173-14-150(2)(a). Though combined use of a site for commercial  
3 and residential purposes can be considered reasonable here, appellant  
4 has shown only that a particular mobile home is incompatible with the  
5 setback. Appellant has not proven that a mobile home of lesser size  
6 and different positioning would not preserve both the use and the  
7 setback.

8 VI

9 Appellant has not shown that the failure to meet setback  
10 requirements is "related to the property, and is the result of unique  
11 conditions such as irregular lot shape, size, or natural features and  
12 not . . . the applicant's own actions" under WAC 173-14-150(2)(b).  
13 Appellant has not proven any distinctive feature of his property  
14 relative to others in the area.

15 VII

16 Appellant has not shown that the "requested variance does not  
17 constitute a grant of special privilege not enjoyed by the other  
18 properties in the area "under RCW 173-14-150(2)(d). Appellant has not  
19 shown that buildings within the setback were placed subsequent to the  
20 imposition of the setback by the FCSMP. Those buildings in place  
21 before the requirement arose can be distinguished from the case at  
22 hand involving new construction.

23 VIII

24 Appellant has not shown that "the public interest will suffer no  
25 substantial detrimental effect" under WAC 173-14-150(2)(e).

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IX

Appellant has not shown that the cumulative impact of similar setback variances would remain consistent with the policy of the Shoreline Management Act under WAC 173-14-150(4).

X

In summary, this is not a case of hardship justifying a variance. Hardship which justifies a variance must arise from the property itself. WAC 173-14-150(2)(b), supra. Rather, this is a case of comments or actions of the Building Inspector followed by development which is contrary to public policy. We conclude, first, that appellant has not shown entitlement to a variance under WAC 173-14-150. We conclude lastly, that comments or actions of the Building Inspector cannot mandate a variance at the expense of public policy. See Finch v. Matthews 74 Wn.2d 161, 169-170 (1968). In this case, the setback represents a public policy to beautify and preserve the shore of the Kettle River by preventing buildings from crowding its banks.

XI

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such. From these Conclusions of Law, the Board enters this



ORDER

The denial by Ferry County of the variance application of Henry N. Roeben is hereby affirmed.

DONE at Lacey, WA, this 19<sup>th</sup> day of February, 1991.

SHORELINES HEARINGS BOARD

  
JUDITH A. BENDOR, Chair

  
HAROLD S. ZIMMERMAN, Member

  
ANNETTE S. MCGEE, Member

  
JON WAGNER, Member

  
WILLIAM A. HARRISON  
Administrative Appeals Judge